

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

H. RAY LAHR,

Plaintiff,

v.

No. CV 03-08023-AHM

NATIONAL TRANSPORTATION SAFETY
BOARD and CENTRAL INTELLIGENCE
AGENCY,

Defendants.

DECLARATION OF ALAN W. TATE

I, ALAN W. TATE, hereby declare and say:

1. I am the Acting Chief, Public Information Programs Division, Information Management Services (PIPD/IMS), for the Central Intelligence Agency (CIA or Agency). I have held this position since 26 March 2004, at which time I also became Acting CIA Information and Privacy Coordinator (Coordinator). I have served with the United States Government for over 30 years, and in addition to my current positions, I have held other supervisory positions with the CIA in the fields of records management and information review and release.

2. In my capacities as Acting Chief, IMS/PIPD, and Information and Privacy Coordinator, I am responsible for, among other things, managing the Freedom of Information Act (FOIA),

Privacy Act (PA), and Executive Order 12958¹ (E.O.) Mandatory Declassification Review (MDR) programs in the CIA. This function includes directing the searches of CIA records systems pursuant to public requests for records under these programs and directing and coordinating the reviews of any responsive records retrieved as a result of such searches. This review process includes undertaking any intra-agency and inter-agency coordinations and referrals² necessary in light of the information in any responsive records. As part of my official duties, I ensure that administrative processing, including the search, retrieval, analysis, review, redaction, and release phases are effected consistent with the Agency's legal duties and as efficiently as possible with the personnel and resources available.

3. Through the exercise of my official duties, I have become familiar with plaintiff's request for information that is the subject of this civil action. I make the following statements based on my personal knowledge, information made

¹ Executive Order 12958 was amended by Executive Order 13292, effective March 25, 2003. See Executive Order 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003). All cites to Exec. Order No. 12958 are to the Order as so amended.

² A "coordination" occurs when a CIA-originated document contains information from another agency and the CIA contacts the other agency to obtain guidance on whether to release or withhold that agency's information. A "referral" occurs when the CIA possesses document(s) that are responsive to a FOIA/PA request but that originated with another agency. In such a case CIA refers the document(s) to the originating agency for it to process and respond to the requester.

available to me in my official capacity, and the conclusions I reached in accordance therewith.

4. The purpose of this Declaration is to provide a description of the CIA's process for responding to FOIA and PA requests and to explain the Agency's need for a reasonable delay to complete its processing of plaintiff's request. I include in my description the additional administrative burdens imposed by the nature of both the records systems involved and the information at issue, including the necessity of referring records to various CIA components as well as to other agencies to ensure that no classified information or otherwise exempt information is inadvertently disclosed, and the status of plaintiff's request vis-a-vis other FOIA requests. I also provide an estimate of the time necessary to complete processing of plaintiff's request.

5. During the past few years, the CIA has implemented numerous and far-reaching initiatives to reorganize its information review infrastructure, implement technological improvements, and dedicate additional personnel to information review duties. All of these initiatives have been aimed in part at reducing the Agency's backlog of pending FOIA requests. Indeed, as detailed below, these efforts have met with significant success; the Agency reduced its FOIA backlog from

Fiscal Year (FY) 1999 to FY2003 on average about 17 percent annually.

6. The nature of the intelligence business, including the compartmentation of records and the need to protect intelligence sources and methods, renders record searches complex and information reviews multiple and exacting. Each page located during a search pursuant to a FOIA request has to be reviewed to determine whether it is in fact responsive to the request. Those records that are responsive then have to be carefully reviewed line-by-line to identify whether any classified or otherwise exempt information must be protected from release, and to ensure that nonexempt information is released if that nonexempt information is reasonably segregable from the exempt information. The reviewers must further determine whether information identified as classified still requires protection in the interests of national security or is such that it can be declassified and released. Further, reviewers must also determine whether the records in whole or in part must be referred to other components within the CIA and/or to other federal agencies that may have equities in the documents. Upon referral, these entities must also conduct a line-by-line review to determine whether any information is properly exempt from disclosure. Individuals in my office must then incorporate all recommended redactions, conduct a review from a corporate (vice

component) perspective, identify and resolve any conflicts between components regarding the exempt status of any information, and produce an integrated final copy of each record before responding to the requester.

7. These procedures, discussed in more detail below, are time-consuming, but essential in order to avoid inadvertent disclosure of exempt information. In responding to FOIA requests, the overwhelming majority of the CIA redactions are based on FOIA Exemptions (b)(1) and (b)(3). By definition, an error on the part of the CIA that leads to the disclosure of such exempt information would reveal information about intelligence collection, sources, methods, or capabilities and thereby could reasonably be expected to damage this country's national security. Accordingly, the utmost care must be given to ensuring proper and thorough review of responsive documents before they are released to a FOIA requester.

8. Based on these factors, the complex nature of plaintiff's request, and the extent of multiple and other agency information, and considering its current FOIA and PA backlog and other information review demands, including the number of other FOIA cases currently in litigation with the CIA that have court-ordered deadlines that Agency FOIA officers are laboring to meet, my best judgment is that the CIA will require eight months to complete the initial phase of processing of plaintiff's

request. By initial processing, I mean that the CIA will have searched for, retrieved, and reviewed all potentially responsive documents, identified which of those documents require coordination and/or referral, and forwarded those documents for any additional review required either internally to other directorates or components at the CIA or to other agencies. It is difficult to estimate with any high degree of accuracy how long the coordination/referral process will take until the Agency has completed the initial processing phase and knows how many documents are responsive and whose information is involved. My best estimate at this time is that the CIA could complete its release or withholding determinations with respect to CIA-originated documents, which do not require coordination with other agencies and respond to the requester within two months of completion of the initial processing phase for a total of ten months. We cannot provide an estimated completion date for documents, if any, which must be coordinated with or referred to third agencies since we cannot speak to non-Agency equities, procedures, or information review demands.

9. In sum, in my best judgment, the CIA can complete processing of CIA-originated documents (not requiring third agency coordination) within approximately ten months, that is, by 28 February 2005.

THE CIA'S FOIA AND PA BACKLOG

10. Because of its diligent efforts, the CIA has been able to steadily and significantly reduce, though not entirely eliminate, its FOIA and PA backlog. The reasons for this continued backlog are twofold: (1) there has been a steady increase over the years in the number of information release demands being made on the CIA; and (2) the process of responding to these FOIA requests in a manner which avoids inadvertent disclosure of classified information is necessarily time-consuming. The demands on the Agency's information review resources, as well as the careful procedures followed for responding to FOIA requests, are summarized below for the purpose of illustrating to the Court why the CIA requires additional time to complete processing of plaintiff's request.

11. The CIA's regulations provide for the processing of FOIA and PA requests on a first-in, first-out basis. 32 C.F.R. § 1900.34. When the CIA receives a FOIA or PA request, it assigns it a reference number and places it in a queue.³ The CIA assigns a reference number to a request immediately upon receipt, even before the request is reviewed and formally accepted. Using this reference number, PIPD can then track the request from its arrival in IMS throughout CIA's processing.

³ FOIA and PA requests are handled in the same manner (and same queues), since the latter are searched under both statutes.

The CIA uses two tracks for processing requests. The first, or main, i.e., complex, track, contains the majority of requests and involves all requests that have to be tasked to one or more CIA directorates for search and/or review. The second track contains those requests that concern previously requested information and/or information previously reviewed, declassified and released, or that seek information the existence of which would be a classified fact, if indeed such information existed. The plaintiff's request, which entails records searches within components of the Directorate of Intelligence, is properly placed in the first track.

12. Despite the CIA's diligence and strenuous efforts to comply with the time limits imposed by FOIA for responding to a request, the sheer volume of information requests as well as the nature of the information involved necessarily results in unavoidable delays in processing in many cases. Moreover, during FY2003 the number of FOIA requests received by CIA increased by 15 per cent over the preceding year.

13. In addition to the volume of requests, processing individual requests is very time consuming. As noted above, the CIA's records systems, like the Agency itself, are diverse, decentralized, and compartmented. They are designed and managed by the components whose activities the records systems are designed to service. Within each component, the search for and

review of any responsive records is performed by only those personnel with knowledge of, and authorized access to, the information at issue. The records systems have been decentralized and compartmented purposely to limit personnel access and to enhance their physical security, thus reducing the chance of successful penetration by hostile intelligence services. Moreover, a search such as the plaintiff's which seeks underlying information, which is not readily identified, requires the first-hand knowledge and participation of individuals who actually were involved in the production of the CIA animation. Consequently, this records search likely will involve manual searches of analyst "shoe box" files (or the equivalent thereof) by several analysts, in multiple components, as opposed to requests seeking records which are housed in automated systems with advanced retrieval capabilities maintained at the directorate or office level.

14. When a request is received, FOIA and PA analysts in PIPD review it to identify the Agency components most likely to have responsive documents. As noted above, in this case, the search for records responsive to plaintiff's FOIA request involves searches for records that may be in the possession of the Directorate of Intelligence, and are most likely at the individual analyst level as opposed to office or directorate level records systems. Moreover, given the technical and highly

specialized nature of plaintiff's request, including the 105 specifically enumerated subparts, the mere identification of the pool of potentially responsive records as well as the review to determine their responsiveness, will be very labor intensive. In order to file this declaration, we have had to ask analysts to begin to locate documents associated generally with TWA Flight 800.

15. In addition to the time required to identify all responsive documents, all records that are located in response to plaintiff's request, regardless of where or in which records systems they are found, must be referred for review to the originating Agency component(s) or its (their) successor(s). The principal reason for this practice is to prevent the unauthorized disclosure of classified or otherwise sensitive information. Responsive records retrieved by a records search in one CIA component often contain sensitive intelligence information from another component. The originating component is uniquely knowledgeable about the kind of disclosures that could, for example, jeopardize specific intelligence sources or methods, and is therefore best qualified to determine what damage, if any, reasonably could be expected to result from an unauthorized release of the information. For similar reasons, and as required by Section 3.6(b) of E.O. 12958, as amended, the CIA will refer documents originating with other government

agencies, or containing another agency's information, to those agencies for review. Since most of the underlying information utilized in CIA's analysis of eyewitness accounts of the loss of TWA-800 is known to have originated with other agencies/entities, the probability that information will need to be referred to or coordinated with other agencies is high. Factors, such as these, add to the time needed to complete the review of FOIA requests.

16. Once a responsive document has been located, a careful line-by-line and word-by-word examination of the document must be performed by experienced information review officers to ensure that classified information and other exempt categories of data are protected, while at the same time permitting requesters to receive all records or non-exempt, reasonably segregable portions thereof to which they are entitled by law. The intelligence field is one in which disclosure of a discrete piece of information by itself may be innocuous, but its release in conjunction with other, seemingly harmless bits of information may result in the disclosure of an intelligence secret. Accordingly, it is often necessary to analyze considerable material beyond the particular documents responsive to the FOIA request.

17. Additionally, the review of classified material under the FOIA and Executive Order 12958, as amended, sometimes

requires deliberative judgments by senior officials as to whether the release of these records reasonably could be expected to cause identifiable damage to the national security. These judgments cannot be made solely by FOIA officers; rather, they must be made by senior officials who are actively involved in the conduct and management of intelligence collection or analytical activities, and who are also increasingly engaged in the review of CIA records in connection with criminal investigations and prosecutions and Congressional and Executive Branch investigations. Such officials are often called upon to respond quickly to international crises and pressures, and therefore cannot, as a practical matter, instantly devote disproportionate time and effort to all FOIA matters without consequent damage to intelligence activities, which are this Agency's primary responsibility.

18. Delays in the CIA's processing of FOIA and PA requests also can occur as a result of unanticipated demands placed upon the CIA's information and release system by non-FOIA matters. The CIA's information and release staffs are frequently called upon to work on ad hoc non-FOIA information requests, such as to conduct searches for and reviews of CIA records in connection with numerous criminal, civil, and Congressional investigations and inquiries, which vary widely in scope and urgency. Past examples include several high-profile counterintelligence and

espionage prosecutions; the Banca Nazionale del Lavoro (BNL) investigation (Iraqi covert weapons procurement issues); spurious allegations of a supposed CIA link to drug trafficking in Los Angeles; and, large and complex investigations into allegations of human rights abuses in Guatemala and Chile. Current examples include responding to records requests from the National Commission on Terrorist Attacks Upon the United States (colloquially known as the "9-11 Commission"), and various U.S. investigations and prosecutions of terrorists. It is generally impossible to predict such requests in advance and, as a result, they place an additional burden on information review resources already fully dedicated to ongoing work.

19. Another development significantly impacting the Agency's ability to process FOIA requests are competing legal mandates, i.e., other statutes that direct that records on specific topics or issues be reviewed for declassification and release. The most notable is the President John F. Kennedy Assassination Records Collection Act of 1992 (JFK Records Act), Pub. L. 102-526, 106 Stat. 3443, reprinted at 44 U.S.C. § 2107 note. Notwithstanding that the independent Assassination Records Review Board ceased operations on 30 September 1998, there are continuing commitments to review or re-review certain records that are ongoing. For example, during 1999, the CIA processed and released to the National Archives and Records

Administration (NARA) over 7,100 documents, consisting of 34,684 pages. More recently, in July 2003, CIA re-reviewed and reprocessed the JFK Sequestered Collection, which concerns the House Select Committee on Assassinations records, a wide range of material collected in response to HCSA requests for documents relating to the JFK assassination. And, earlier this year, the administrative files for the JFK declassification project (1992-2000), consisting of 7,250 pages, were transferred to NARA, bringing the total transferred under the JFK Act by CIA to approximately 364,000 pages.

20. In addition, the Agency must comply with the provisions of the Nazi War Crimes Disclosure Act (NWCDA), Pub. L. No. 105-246, 112 Stat. 1859, reprinted at 5 U.S.C. § 552 note (2003), which mandates that it review and release various records on Nazi criminals. To date, the Agency has released to NARA pursuant to the NWCDA nearly 44,000 pages of CIA material and 1.2 million pages from the Office of Strategic Services, CIA's predecessor. Agency personnel have also reviewed for CIA equities 30,000 pages originated by other agencies in connection with this effort.

21. Not surprising, however, among the most significant developments impacting FOIA and other information release programs in the last two and a half years have been the events of 9-11 and their aftermath, i.e., the continuing war on

terrorism, Operation ENDURING FREEDOM, and Operation IRAQI FREEDOM. One need only to read the newspaper or listen to the evening news to be aware of some of the increased demands on information review and release resources and the sensitive information issues that have arisen, e.g., the declassification review and release of the President Daily Brief item for 6 August 2001. Foremost among these are requests generated by the Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence Joint Inquiry Into the Terrorist Attacks of September 11, 2001 ("Joint Inquiry") and the 9-11 Commission. The Agency anticipates a heavy demand for document searches and releases from the President's Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction as well. In addition, information review personnel are also engaged in reviewing records as part of ongoing efforts to prosecute individuals supporting international terrorism and enemy combatants. Not as readily apparent is the diversion of experienced personnel from information review assignments to mission activities, e.g., officers with prior DO experience supporting counterterrorism efforts. For example, from October 2001 through 2003, 15 people were reassigned from information search, review, and release responsibilities within my division and detailed in support of

counterterrorism operations for periods ranging from six months to over a year.

**CIA'S FAR-REACHING EFFORTS TO IMPROVE
AND EXPEDITE ITS FOIA PROCESSING**

22. Despite these demands, the CIA has made tremendous efforts to improve its processing under the FOIA and other information statutes through continuous process improvements, technological advances, reorganization, and increased dedication of resources. Through these efforts, the CIA was able to substantially reduce its FOIA and PA backlog during each of the past six years.

23. In order to create organizational efficiencies, the CIA began in 1997, with the creation of the Office of Information Management (OIM), to consolidate the operations and management of the various information review and release programs of the CIA -- numerous discrete, legally mandated or voluntary programs involving thousands of public and official requests and demands each year. One of the Agency's principal goals in creating OIM and its successor, Information Management Services, was to obtain the resource and personnel efficiencies necessary to reduce the time required for the administrative processing of FOIA, PA, and MDR requests. Toward this end, OIM retained the services of independent contractor personnel, who had prior CIA experience, to support the Agency's efforts to

reduce its FOIA backlog as required by the Electronic FOIA Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, see 5 U.S.C. § 552 note. OIM funding for this task also was shared with Directorate Information Review Officers to assist the directorates in addressing their respective backlogs.

24. In addition, in recognition of the fact that the FOIA and PA backlog has been exacerbated by the substantial demands that litigation place upon our FOIA officers, the CIA created a unit and increased the staffing within the FOIA office to handle FOIA and PA litigation. This unit handles the administrative processing of FOIA requests in litigation, acts as a central support center to coordinate actions on such requests and supports the Office of General Counsel during FOIA litigation.

25. The CIA has also acted to significantly upgrade the technology used to manage its FOIA processing programs. During FY 1998 the Agency saw the delivery and operational capability of an electronic redaction and case management system -- Management of Officially Released Information (MORI)-- used by the FOIA and other information release programs. Replacing a paper system for document management that had been in place since the start of these programs in 1975, the new system permitted all aspects of a new case to be processed electronically, including case tracking, scanning of incoming correspondence, electronic capture of outgoing correspondence,

as well as scanning and electronic redaction of relevant documents. The efficiencies offered by this technological improvement are significant, and development efforts are already underway to bring the next generation system online.

26. As mandated by the Electronic FOIA Amendments of 1996, the CIA established a web site on the Internet located at www.foia.ucia.gov. This site provides electronic access to frequently requested documents and educates the public about its rights under the various access laws. The site encompasses a continuously growing collection of historical records, as well as frequently requested documents, which have been made available to the public under the FOIA. Because this Internet web site includes popular collections released under a number of information release efforts, the public availability of these records should ultimately reduce the overall number of FOIA requests.

27. However, it is impossible for the CIA to eliminate its backlog completely, given perennial budgetary constraints and the heavy and increasing volume of work that is an inevitable reflection of sustained public interest in the Agency's activities and information, as well as the time-consuming meticulousness with which reviews of classified information must be conducted. Nevertheless, the CIA's wide-ranging initiatives have enabled the Agency to significantly reduce its FOIA and PA

backlog during each of the last six years. For example, in FY 1998, the CIA completed 6,521 requests -- more than in any year since the FOIA was enacted and 1,845 more than in FY 1997. Since the conclusion of FY 1997, when the backlog stood at 4,867 cases, CIA has steadily reduced its backlog to the point that at the conclusion of FY 2003, it had been reduced by 70 per cent to 1,432 cases. A recently concluded study by the General Accounting Office⁴, based on data from FY2000 to FY2002, noted that "[T]he Central Intelligence Agency is the only agency that over the past three years has consistently decreased the number of requests in its backlog of pending requests."⁵ In fact, an earlier GAO study⁶, had noted that CIA "was the only agency with a processing rate over 100 percent in each year for the fiscal years 1998, 1999, 2000, and 2001." Thus, CIA has made steady progress, reducing its backlog six years running.

PLAINTIFF'S REQUESTS AND CIA PROCESSING

28. By letter dated 8 October 2003, Mr. Lahr stated that in November 1997, "the NTSB and FBI released the CIA-produced video animation of Flight 800 continuing to fly, over 3,000 up," after nose separation. He requested "all records upon which

⁴ United States General Accounting Office, Information Management: Update on Freedom of Information Act Implementation Status, GAO-04-257, February 2004.

⁵ The report also noted that the Agency had decreased its median processing times between 2001 and 2002.

⁶ United States General Accounting Office, Information Management: Update on Implementation of the 1996 Electronic Freedom of Information Act Amendments, GAO-02-493, August 2002.

this publicly released aircraft flight path climb conclusion was based, and the 105 FOIA Requests are itemized in the enclosed Excel printout" (30 pages). Plaintiff did not request expedited processing or identify any exceptional need or urgency in processing.

29. By letter dated 20 October 2003, CIA acknowledged receipt of Mr. Lahr's request (by facsimile and regular mail) and assigned it reference number F-2004-00078 for identification purposes. The letter went on to inform Mr. Lahr that "[O]ur analysts will review your request, and we will advise you of any problems . . . or whether we can search without any additional information."

30. On 6 November 2003, Plaintiff filed the instant complaint with the Court.

**THE CIA'S ESTIMATED TIME FOR COMPLETION OF PLAINTIFF'S
FOIA REQUEST**

31. CIA will treat plaintiff's FOIA request as having been accepted on the date on which the request was received by CIA's FOIA office - 8 October 2003. At that time, the Agency had over 1,500 FOIA requests in queue in various stages of processing; of these, approximately 865 currently remain ahead of plaintiff's request in the complex queue.

32. At this time, the CIA has not yet completed its search for records responsive to plaintiff's request. Until the number and nature of responsive records are known, I cannot accurately predict the amount of time required for processing.

33. However, if there are a relatively modest number of responsive documents, I estimate that the Agency can complete processing of CIA-originated records in approximately 10 months. Obviously, if the number of responsive records is greater than anticipated, it may impact this estimate.

34. Another major determinant of the amount of time necessary to process plaintiff's request is the degree of interagency referral or coordination which will be required. As was noted earlier (§ 15), most of the information utilized in CIA's analysis of eyewitness accounts which is presented in the animation is known to have originated with other government agencies and entities; consequently, extensive referral and/or coordination will be required. In addition, plaintiff has requested information provided by the Boeing Corporation; such material, if any, will need to be processed in accordance with Executive Order 12600, 52 Fed. Reg. 23781 (June 23, 1987), which governs predisclosure notification procedures for confidential commercial information.

35. At this time, it is impossible to project when a Vaughn index may be completed since neither the volume nor nature of responsive records is known.

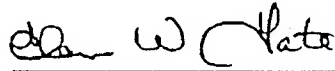
CONCLUSION

36. The CIA is making all reasonable efforts to comply with the FOIA's requirements and deadlines. Regrettably, compliance with these deadlines is not always possible. With respect to plaintiff's request, due to the complicated nature of the request, the manner and level of the records search, the nature of potentially responsive documents, and the careful, multi-step review the CIA must conduct to prevent the inadvertent release of classified, national security or other exempt information, and upon consideration of what is humanly possible based on the Agency's current resources, my best estimate is that it will take until February 2005 to complete processing of CIA records.

37. For the above reasons, the CIA submits this declaration in support of its request for a stay of proceedings until such time as the CIA has completed processing plaintiff's request.

I declare under penalty of perjury of the laws of the
United States of America that the foregoing is true and correct.

Executed this 16 day of April 2004.



Alan W. Tate
Acting Chief, Public
Information Programs Division